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Review of the Opinion of Judge Blake of the Probate Court of San Francisco, Rendered September 23d, 1863, on the Petition of H. M. Garwood for Letters of Administration on the Estate of Joseph M. Garwood, Deceased.

[See EVENING BULLETIN of Sept. 23, 1863.]

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WHEN the announcement was made that the above Petition was before the Probate Court, much interest was manifested, on the ground that it was the first time any such case had come before a Court in California, and that important future results depended upon its just decision.

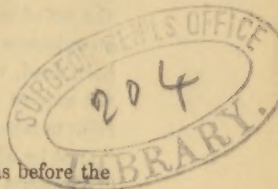
It was hence hoped that the opportunity for California to take the initiative in establishing just principles in conformity with the progress of medical knowledge would not be lost. As it is, however, the old routine has been followed, and the truth of science and the object of law remain veiled in as much obscurity as when Lord Coke stated that "forsooth the child may be born dumb." It is with the highest deference to the learned and much esteemed Judge of the Probate Court that the following retrospect of his decision is offered, and in full view of his high integrity and the assiduity he must have employed in forming his decision.

For a clear understanding of the argument, it is desirable that the reader should have the decision of the Probate Court in view, and its appearance in the January number of the San Francisco *Medical Press* is the reason why we feel more at liberty to examine its merits.

The point at issue appears in this case to be whether the child, J. M. G. was, or was not, born alive? "If alive, it had an interest in the estate of its father."

A radical obscurity exists in the very initiatory question. We apprehend the question to be less, was it born alive? than was it born alive in the object and intent of law to permit it to receive and give away property. The object of the question is less to determine what is *Life* than what shall be the *succession of money*. The litigation is for property, not to define nor defend life, and hence the real question is, or should be, what is Life in the intent of laws of succession of property? In this matter the interests of society, so highly excited, cared little for a definition of what is life in the abstract—a pulsation, or a twitch more or less; but what is life in its legal expectancy of estate.

This want of clearness in the first placing of the question is not attributable to the present decision alone; it has pervaded all the cases decided both before or since Lord Coke declared that a child might be born dumb. The sagacious Judge, in his zeal to display his physiological astuteness, forgot



that he was born dumb himself, and that all children are so born, and remain so until they acquire language. The chief regret is that the present decision failed to disentangle, as it might have done, these physiological refinements, and establish the precedent of the true significance of life in the law of estates.

The decision of the Court, after admitting with Bouvier, that "birth is the act of being *wholly* brought into the world; the fact of having acquired an existence independent of one's mother;" and also, "should the child be born dead, whether it died in the womb, or during the act of birth, it does not acquire any civil rights," considers it "as settled" that to acquire the right to inherit and transmit property the child must be born alive—that is, "must be alive after a complete delivery." This settled, he proceeds to say, "We might next attempt a definition of Life." "But is any definition necessary?" "Is it in the capacity of any man to give us a definition which could aid us in our inquiries?" Here, then, the Court confessedly falters, and appears to say it cannot do that which it is not in the capacity of any man to accomplish. But this is just the nutshell which holds the whole lawsuit. If this point cannot be defined, there is no room for litigation. It is very true this is the vexed question from time immemorial. Philosophers, physiologists, and psychologists have broken their lances on it in vain.

If no legal decisions, involving this point, are to be had until some philosopher can define beyond an objection, "what is Life," the division of estates may lay in abeyance until the last claimant become indifferent to their possession. This long acknowledged indefinability is the best evidence of the correctness of the position that the question to be solved is not—what is Life in the abstract? but what is that *legal Life* on which the possession, enjoyment and conveyance of property devolves. This latter state of life may certainly be determined. The Court, in despair of a definition, indicates that life can only be determined by its manifestations, but presently goes on to show that all those manifestations are fallible. In truth, many of the so called signs of life may exist together, and yet the combined testimony may show that life was extinct at the time of entire delivery. What the jurist wishes to define is, what is the *degree* of Life which sanctions the inheritance of property?

The Court then leans for its corroborative testimony on the manifestations of Life. Of these, two are summarily disposed of in this decision, viz: *crying* and *breathing*—for the Judge clearly says, "that crying or breathing is sufficient evidence of live birth, is unquestionable; but the child never cried, nor, so far as could be discovered, did it breathe after its birth." The examination of these signs of life might hence be dispensed with, were it not for the intrinsic merit of the discussion.

The elaborate decision of the Court, therefore, passes on to seek in "motion, stirring, and the like," for the satisfactory manifestations,—and herein commences the most singular confusion of word and thought. When Mr. Taylor asserts that "even the spasmodic twitching of any of the muscles of the body is regarded as satisfactory proof of live birth," he certainly weakens

very much his claim to appear as authority. What he may have thought, when he wrote, is not by any means what is admitted to-day. No one would be willing to assert that the convulsive twitching, the frown, or the smile, which has often been observed long after decapitation, was the expression of a thought, or an effort of will in the decapitated head. Wharton and Stillé, in stating that "every spontaneous movement is an evidence of life," are very justly guarded as to what measure of it may be "evidence before a Court of law." To make the confusion of explanation and array of authority clear, it is necessary to state the meaning of that vague sort of word "spontaneous" in physiology. It would be well replaced by the word "voluntary." That is "spontaneous" which results from the action of the will. Spontaneity is an effort of mind; it is the product of thought; it is the result of a reflection, a mental emotion, or a passion. However rapid or instantaneous may have been a spontaneous act, there was yet an interval between it and the mental operation by which it was elicited—Spontaneousness involves Will. Now, the case is quite different with muscular, irritability, excitability, contractility, "spasmodic action." Contractility is simply a quality of muscular fibre; excitability is a property of contractility, by which it responds to the application of a stimulus; irritability is the celerity with which contractility is awakened when a stimulus has been applied to muscular excitability. Therefore, "irritability" is not "spontaneous" motion—and hence, the expression that "irritability as manifested by spontaneous motion" is an absurdity.

In the case of *Fish vs. Palmer*, the warm water acted as a stimulus to a trace of muscular contractility yet remaining, and the kindled excitability was manifested by a spasmodic action; but no one would say there was any spontaneous motion. Hence the Court dismissed the case, while Dr. Taylor, in approving the same decision, again weakens himself as authority.

Volition must emanate from the brain, and the above mentioned qualities of muscular fibre are obedient to volition; but it is also true that those qualities have their *involuntary* vitality, and they may manifest themselves after all connection between the brain and the muscle has been severed for quite a length of time. The word "voluntary" should replace the word "spontaneous," which latter should be referred to moral philosophy, where it more properly belongs—and rather discriminates the action of two wills upon each other. We say a spontaneous act of benevolence, when the act is voluntarily done, without being invited by the influence of another's persuasion.

With these explanations in view, it will be seen in what an almost hopeless confusion and indecision would a jury's mind be thrown by the following definitions of the Court:

"I think the rule laid down by Wharton and Stillé, that "every spontaneous movement is an evidence of life," is the best sustained by such English and American authority as we are favored with. I suppose this includes every voluntary movement and every natural action of any part of that internal organism, self-acting so far as relates to ourselves, by which "we live, and move, and have our being," every action of any part of the human system which is the result of "its own impulse, energy, or natural law, without external force." It excludes every muscular movement which comes not



through the will, or which is not the result of its own impulse or natural law, but is caused by some extraneous force, acting directly and ultimately upon the muscular system, whether that force be electricity, or cold, or the atmosphere, or any other external agency by which the muscles of the human body may be affected. It excludes every movement or action which, from any cause, may be manifested in a body from which life has ever so recently, and from whatever cause, departed."

This unfortunate description at the same time includes and excludes the same very subject in debate. It includes "every natural action of any part," and it excludes "every muscular movement which comes not through the will." A muscular movement is none the less a natural action, because it is involuntary. The Court, however, finally extricates itself by excluding all involuntary movement or action of the muscles. Hence, as infallible signs of life, such manifestations disappear as indispensable testimony.

As regards the circulation between the mother and child as a sign of life, the Court admits itself "entirely without knowledge." But on this before severance of the umbilical cord, or even for a time after depends the beating of the child's heart. The impulsion from the maternal placenta may keep the heart beating long after a fatal lesion of the foetal brain. Again, after severance of the cord, the heart may continue its contractions by its own involuntary irritability, when the foetal brain has ceased to supply it with nervous energy. Notwithstanding, however, that the Court was "entirely without knowledge" upon the circulation, and in regard to the beating of the heart, was "not free from suspicion that in the instance in question the real cause was something else than cotemporaneous vitality," yet he announces that "it should be held that the beating of the heart 'was spontaneous,' and that the child was born alive."

Now, firstly, the conclusion appears very suddenly forced, when in the midst of such doubt and suspicion the assertion is thus positively advanced, and simply because, on general grounds, the mother was well, and gestation had been favorable. Secondly, is it not well known that the heart does not beat "spontaneous?" It is not a voluntary muscle,—if it were, a man might stop his heart's action by an effort of volition.

Aside from this distinction, it is established that death may occur in a two-fold manner—first, it may occur in the brain, while the heart may continue to beat for an indefinite time after; or, secondly, it may occur in the heart first, that organ entirely ceasing to move while the sensorium, for a time indefinite, manifests its vitality. In the case under consideration, the facts during delivery show that death first occurred in the brain, and in a manner easily to permit a continuance of the heart's action, by means of the placental impulsion or its own contractility after severance of the cord.

The complaint, in the decision of the Court, that the medical testimony was not sufficiently ample, fairly opens the subject of the system of law by which such cases are adjudicated. There are no distinct Statutes in our English-American law. In trials of this nature, all the old precedents are hunted up; antiquated decisions are quoted; all the old lumber of by-gone cases is ransacked and shaped to fit the new requirement; and such medical testi-

money as may be most convenient is introduced, but only under the most jealous supervision. Out of this conglomerate, the Judge forms, as best he can, an opinion, which is considered a decision of the case, and the Jury, when a Jury is employed, is instructed to agree with it, to which, in its own indecision or incapacity, it is generally most happy to conform.

The number of cases on record wrongly decided is the best proof that this system if not generally, at least very often utterly fails of its intent. Is it not evident that general principles, especially those which involve medical science, cannot be fairly established during the conflict of special interests? Lawyers plead in special cases to win their suit,—not to furnish the public with general principles. Whatever therefore conflicts with such special interests must be shut off. Hence, medical experts are subject to opposing restrictions, and being under oath are scrupulously guarded and reserved. What they might elucidate is not elicited. While the mind is harassed with questions and cross-questions, often irrelevant, the main truths are omitted, or counsel may not know really what to ask for, nor when the subject is exhausted. It is only when general principles can be deduced in anticipation of particular cases, and when personal interests are not prejudiced in the investigation, that just and true decisions can be uniformly anticipated.

It seems to result that for the case in question there was no statute; general principles were not applicable; the cases cited would not fit; the precedents were antiquated; and medical evidence, the axle-tree of the whole suit, was neither ample nor instructive, when elicited in the trial of a special case.

If then, the law have no exact letter to define it, certainly might the spirit of the law, its intent and object, be allowed to rule. So many instances occur where the spirit of the law, or its intent, is defeated by an inaccurate wording which confines it to its letter, that it is only fair that the spirit should prevail when the letter fails. Now, if the law permit an infant to inherit from the moment of conception, and yet hold its inheritance in abeyance until it be born, and born alive, it certainly was with an object, viz: that it justly asked "that evidence" of healthy life, that it might enjoy and transmit property.

That it does inherit from the earliest epoch of gestation is clear, because by dying it loses its civil rights—hence, it had them previously. The just deduction naturally follows not only that the child should be born alive, but that it should be born liveable. It should be born sufficiently alive, to be able to go on living after severance from the mother. Of what consequence is it to the law, in this connection, that a child can only live an instant or that its heart fluttered a moment with or without breath, if not, that it proved the average chance that it might survive to enjoy its inheritance. Were the law indifferent to this circumstance, it would never have allowed it to inherit, even provisionally, between its conception and birth. The child was very much more alive at 4-months' gestation, than it was at the time of its birth; and, hence, if it had rights of conveyance at birth, which were independent of an average chance of living to enjoy inheritance, it might have willed away, by its legal guardian, that inheritance at 4-months' gestation, in case any danger of the mother's death should render the testament necessary.

Breathing is not the absolute proof of the life of the child : it only proves the life of the lungs—for a child may breathe and yet be stricken with a fatal paralysis of the spinal cord. Nor, yet, does it infallibly prove the life of the lungs, for a trace of muscular irritability, or contractility, may cause the thoracic muscles to contract and lift the chest, when air might rush into the lungs ; and when pressure again compressed the thorax, force the air out again. This might be mistaken for breathing, and be sworn to as such by interested parties, while in fact it was only air mechanically passing in and out from inanimate and unvitalized lungs. This is in fact the idea upon which is based the process of Marshall Hall, for resuscitation, as offering a prospect which sometimes succeeds, to rekindle a faint spark of vitality in the lungs, and, which being too weak of themselves to lift the thorax, would be unable to revive, but which with a little artificial aid might be fanned into new vigor.

No person can transmit property, unless he have possessed it. Hence, a child cannot convey legally, until it has been put in legal possession. If a child be pronounced livable, or really "alive," (and in this view, "alive," is the English word for liveable, or *viable*, and viable is of Latin rather than French derivation ; viz : in Latin, *vita*, life ; in French, *vie*, life ; *vie-able*,) it may instantly be put in legal possession of property, and may then convey it, but not until then. This constitutes, we apprehend, the spirit and intent of the law. Certainly, then, no administrator of the law could proceed to its application, and put property in possession of a child which only gave a dubious breath or two, when only half way into its new world of atmospheric air, and which indication of breath it entirely lost before its perfect birth.

One of the motives of the law for the registration of births is founded in this idea. A proof is thus legally given, accessible in cases of litigation, of the birth of a liveable child, i. e., of a child born in a condition, first to be put in possession of property, and then to enjoy it by conveyance or otherwise, as the future circumstances of life or death may dictate. If the law were more obtrusive, it might exact the presence of a legal officer at the birth of a child to certify to its liveability or viability—or, in other words, its ability to receive and part with *property* ; precisely as the Roman Catholic Church is scrupulous, to the most technical nicety in requiring baptism (even in utero) for the salvation of the same child's soul. Indeed, it is well the law is thus diffident, for otherwise no birth would be valid unless a doctor, a priest and a lawyer were present. Nor is this entirely a pleasantry, nor a refinement. It is what actually takes place in royal births, and expressly with regard to the succession of property. This being the chief reason why the law cares about the birth of children, it is a little more particular about the birth of royal children. They have royal property, and the public is directly interested in the succession, and as we derive our law from an aristocratic country, it has not yet learned to care so much for the birth of democratic infants.

Let us return once more upon the subject, and enquire about life. The expression "physiological life" is a sort of tautology, only used to point out

a distinction from some other acceptation of life, as legal life, etc.

Life, physiologically, is that animation of matter which enables it to perform vital functions. Life, legally, is more; it is that association of vital functions which may permit a being to have, or receive property, and hence to part with it to another.

Perfect birth is the entire extrusion of a child from the body of its mother, and its complete severance from the maternal body, by the division of the umbilical cord, so that the child live independent of the mother. Anything short of this, legally speaking, is "imperfect" birth, and no birth-right, viz: the rights and privileges to which a being is legally born can be established. Johnson defines Birth "the act of coming into life." This ancient definition is no longer worthy of consideration. The act of coming into life is done at the moment of *conception*. If the lexicographer meant by "life" the "world," the definition is still worse, for the child in utero is as much in the world as after birth. But the act of coming into life, as Johnson desired to imply, is not birth. There is not birth until that act has entirely transpired. After that act there is birth.

Admitting for a moment that the word "life" is used instead of the word "world," it signifies according to the intention and purposes of law: Coming into the atmosphere in order to establish the remaining function of life, requisite to constitute perfect life, viz—respiration. The child has gone through the various indispensable processes of its organization safely, with the exception of one which is essential to its further development, viz: the oxygenation of its blood by respiration—and for this it must change its place in the world and emerge into the atmospheric air. Perfect life, therefore, is not established until after perfect birth. Anything short of this, is *imperfect life*; and, legally taken, the law would not recognize an imperfect life, because, for the object of law, it is really no life at all.

But again, in strictness we cannot stop here: a legal life is not yet established. Muscular motion, respiration, and a vocal sound, (crying) are together not enough to constitute the ability to have, and to convey away. Certain *excretions* must be performed to give the proof of liveability, viz: *micturition*, and the passage of *mecomium*—but these only as evidence that the organs for those functions are perfect. Thus, absence of the kidneys; closure of the urethra; imperforate anus, if not remediable, necessarily render a child non-liveable. Now, the psychological or metaphysical importance of all these circumstances is simply this: until all these indispensable functions of life have been successfully established, and may continue successfully to act, the new-born being cannot be supposed to have a "will;" neither to act for itself, nor to act by proxy: for a proxy is supposed to have derived the only will it has a right to exercise by direct instruction from the will it represents. The law only anticipates this will, by supposing what it would or should do, were it present to act independently. This affords the true signification of the word "will" for "testament." But, where there was no perfect life, there could be no perfect will—and the law would not recognize

as *anything* that which could not be an established fact.

Life, then, for the purposes of legislation may be defined, that association of vital functions which permits a being to live independently of its parent, and by having proved its ability to continue so to live, be qualified to get and to give property.

To illustrate this question more fully, the converse of the proposition may be asked. If life is to be determined by a single breath, and that breath must be breathed, for the due purposes of law, after the complete and entire entrance of the child into the atmosphere, or its separation from the mother, to enter upon independent life,—then,—what is death?

Death is the permanent cessation of the brain, or the primary organ of life, to supply the vital force, or nervous current to all the animal organs. It is this vital force, having its source in the brain upon which the entire organic economy depends for its animation and vital existence. This nervous current arrested permanently, or extinguished, death instantly commences. The body yields to the chemical laws of inorganic matter, and decomposition begins. How is this definition applicable to the case in question? The long compression of a head too large to pass through the maternal organs, produces that state of cerebral apoplexy which arrests the vital processes, and stops the flow of nervous vitality. Unless this state can be promptly relieved, death ensues—but this could not be relieved—and when the head was finally extricated, the function of the brain had already ceased. But, why could it not be re-excited? because the thorax of the child came instantly in the same compression which the head had suffered, thereby preventing the only relief which could come to the rescue, viz: the expansion of the lungs, the vitalization of the blood with air, and the removal of the internal compression on the brain, by drawing off its oppressive weight of stagnant blood.

Hence, then, in this case, death was established, without relief, before the body of the child was extricated from the mother; or, in other words, before a perfect birth had been effected. The death wound was given by the compression of the brain before the delivery of the head.

It cannot be concealed that throughout the entire decision of the Court, the opinion is perplexed and embarrassed, and, really, leans against its own conclusions. But when, finally, the Court, in admitting with high compliment the superiority of the jurisprudence of France and Germany over that of this country or of England, declares that it is satisfied that "in a French Court it would not be held that this child was born alive," and further adds, "it is believed that the French medical jurists would hold that the child in question was not born alive—they (viz: France and Germany) manage such matters better there than here"—the exclamation is forced. Why, then, should not the Court have established the rule in accordance with such high authority? Surely, the Court had no less the privilege than Lord Coke to make a rule which reason dictated; and the initiative taken in the Probate Court of California would have been alike honorable to the conscientious Judge and to an independent State.